No. 22,259

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LEVINSON'S OWL REXALL DRUGS, INC.,
Respondent.

BRIEF FOR THE RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board.

CORBETT & WELDEN

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SUBJECT INDEX

AUTHORITIES CITED

Cases

Statutes

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JURISDICTION.

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended, for enforcement of its order issued against Respondent, Levinson's Owl Rexall Drugs, Inc., on December 6, 1966. This Court has jurisdiction of the proceeding. No jurisdictional issue is presented.

STATEMENT OF THE CASE.

In the above-entitled case, the Trial Examiner found the Respondent had engaged in unfair labor practices within the meaning of Section 8(a) (1) of

the National Labor Relations Act of 1947 as amended. Further, the Trial Examiner specifically found the record did not establish that Beverly Marsh was discharged in violation of the Act. (R. 29).[1] The Board upheld the Trial Examiner's finding with respect to the 8(a) (1) violation, to which Respondent did not take exception. But the Board, without the advantage of observing and hearing the witnesses, reversed the Trial Examiner and found a Section 8(a) (3) violation in the discharge of Beverly Marsh. (R. 59). Respondent contends that the Board is in error by so reversing the Trial Examiner and seeks to have this Court deny enforcement of that portion of the Board's order which is based upon violation of 8(a) (3). The evidence upon which the Trial Examiner's findings are based is summarized below.

Respondent Levinson's Owl Rexall Drugs, Inc., herein referred to as the Company, is a small corporation which operates two drug stores in Napa, California.[2] For several years the Company has been the subject of organizing activity by the Retail Store Employees Union, Local 373, Retail Clerks Inter-

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1. References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portion of the stenographic transcript are designated "Tr." References designated "GCX" and "RX" are to exhibits of the General Counsel and respondent, respectively. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Trial Examiner's findings; those following are to the supporting evidence.

2. Although the Company operates two stores in Napa, only the Bel-Air Shopping Center store, also referred to in the record as Store No. 2, is involved in this proceeding.

national Association, AFL-CIO, herein referred to as the Union. It is uncontroverted that two previous organizational campaigns leading to elections had taken place, one in 1957-58 and the other in 1960-61. (Tr. 191). In neither case did the employees select the Union as their representative. In this long history of organizational activity, there is no showing that unfair labor practice charges have ever before been filed against the Company.

In the latter part of April, 1965, it came to the attention of John Frommelt, Manager of Store No. 2, that the Union was again active, at least with respect to the downtown store, No. 1. (Tr. 152). Believing the stores to be faced with yet another organizing campaign and desiring to inform the employees of the store's past relationship with the Union, John Frommelt held individual interviews with several of the non-supervisory employees of Store No. 2 (R. 16; Tr. 153, 155). Whether the interviews were violations of Section 8(a) (1) of the National Labor Relations Act, as held by the Trial Examiner, is not relevant to this proceeding, since the Company did not file exceptions to the Trial Examiner's finding on that count. Although there was conflicting testimony as to the content of John Frommelt's statements to the employees during the interviews (R. 16; Tr. 9-11, 90, 155), there was no allegation and no evidence whatsoever of any coercive interrogation of Beverly

Marsh. According to Mrs. Marsh herself, John Frommelt did not make any threats. He simply appealed to her loyalty in the light of her knowledge that the Company preferred not to be organized. (R. 16; Tr. 37, 60).

Beverly Marsh was working in the camera department of the store during April and May of 1965. (R. 21; Tr. 33). On or about May 4, 1965, Mrs. Marsh took the Union leaflet dated May 1, 1965 to work. (R. 21; Tr. 470, GCX 3). During the course of the day, she brought the leaflet to the attention of Robert Frommelt, the Assistant Store Manager, by pointing to the listed benefits and saying the Company "didn't stack up too well" (R. 21; Tr. 45-46, 62). Bob "jokingly" replied that he had also received a leaflet. (Tr. 61). Mrs. Marsh and Bob Frommelt then discussed the listed benefits, concluding with discussion of a vacation schedule of three weeks' vacation with pay after five years of employment. (Tr. 62). This caused Bob to comment: "I would sure be happy to get three weeks myself." (Tr. 391). According to Beverly Marsh, "We (she and Bob) didn't have an angry conversation." (Tr. 63).

After this conversation which, according to her, was not an angry one, Mrs. Marsh alleges that Bob Frommelt's attitude toward her changed. Bob became bossy, (R. 23; Tr. 49) and was "rarely there" (meaning in her area of the camera department). (Tr. 49).

As for John, Mrs. Marsh says he began to give her direct orders instead of asking her *if* she would do something. (Tr. 51). (emphasis supplied) Mrs. McDonald, a fellow employee, first stated that, after the leaflet conversation, Bob was not too friendly with Mrs. Marsh (R. 26; Tr. 17), but that he never got sarcastic or rough or mean. (Tr. 19). Later, Mrs. McDonald said that she thought initially this incident of the leaflet was "just a joke" but then she noticed "people weren't friendly with anybody" and this cool atmosphere involved all employees—not just Beverly Marsh. (R. 26; Tr. 26).

Another witness, Mrs. Baierline, could not recall when Bob ever criticized Mrs. Marsh's work, (R. 26; Tr. 115), and only once could she recall criticism by John. The constant "picking" on Mrs. Marsh alleged by Mrs. Baierline (R. 26; Tr. 94) was eventually defined as the assignment of more work than Mrs. Marsh could handle (R. 26; Tr. 115), but Mrs. Baierline could not recall any evidence that Mrs. Marsh had not completed any particular job. (R. 26; Tr. 116).

Mrs. Marsh herself alleged that her workload was increased after the conversation with Bob about the leaflet because John Frommelt closed the so-called "wild drawer." (R. 23-24; Tr. 51). However, John said that by closing the drawer, efficiency was improved, since Mrs. McDonald, the clerk in charge of

the liquor counter, could devote her full attention to her department. The change also improved the Company's check on discrepancies in the cash count between so-called "D" and "E" drawers. (R. 24; Tr. 187-188). Bob Frommelt stated that the change actually resulted in less work for Mrs. Marsh, and Bob McCromick, Mrs. Marsh's immediate supervisor, said it relieved camera department personnel from covering the liquor department. (R. 24; Tr. 396, 351). In fact, it was Al Frommelt, owner of the Company, who ordered the change, (Tr. 395), and there is not even an allegation on the record that he was unfriendly to Mrs. Marsh.

The excise tax project also was alleged to show an increase in Mrs. Marsh's work, despite the fact this task was assigned to all personnel in the department. Larry Dent stated that he did about twenty-five per cent of the excise tax work and he said that Bob Frommelt, Bob McCormick and Beverly Marsh each contributed to the project. (Tr. 340).

On June 25, 1965, Mrs. Marsh prepared greeting cards for shipment to one company. She divided them into three bundles, according to three specific holidays. She indicated by written instructions that the packages were to be shipped separately. The testimony of John and Bob Frommelt and Helen Duncan showed, and the Trial Examiner so found, that Mrs. Marsh

had the authority and the responsibility to designate how packages should be shipped. (R. 25-26; Tr. 180, 383, 290-292).

It is uncontroverted that shipping packages of over twenty pounds by freight rather than by parcel post is considerably less expensive. When John Frommelt noticed that three packages all weighing under twenty pounds—but of a combined weight of substantially over twenty pounds—were all shipped to the same company, he investigated. Upon learning from Mr. Gaston that Mrs. Marsh had given the instructions, John Frommelt angrily and publicly reprimanded Mrs. Marsh. (R. 21-22; Tr. 55, 169-170, 323). This apparently upset Mrs. Marsh and she left the store without explanation twenty to thirty minutes before her meal break. She did not inform anyone in authority but merely told one of the other girls, Mrs. Duncan, that she was leaving. (R. 22; Tr. 56, 283, 324-325).

Returning to the store five minutes before her dinner hour was over, Mrs. Marsh sought out John Frommelt before she reported to her station. She confronted him in the pharmacy sales section of the store where she upbraided him for criticizing her publicly. (R. 23; Tr. 58, 182, 308). This rebuke did not serve to calm John Frommelt since he had already been informed that Mrs. Marsh had left the job without permission. He asked her to come to the privacy of his

office and there he demanded to know whether or not she had in fact walked off the job. When she admitted this action and offered no explanation, John Frommelt terminated Beverly Marsh. A highly emotional woman, Mrs. Marsh said, "That's O.K. with me," picked up her time card, wrote "gratis" for the balance of the day and left the store. (Tr. 77).

The Board, after consideration of the transcript, found that John Frommelt seized upon Mrs. Marsh's twenty-minute absence as a pretext to conceal his determination to rid the Company of a senior employee because she revealed herself as a Union adherent. (R. 59). In a carefully reasoned analysis, after having seen and heard the witnesses testify before him, the Trial Examiner found it did not appear plausible that the reason given by John Frommelt was a pretext and that the Company would wait almost two months after Mrs. Marsh's alleged manifestation of Union interest to discharge her, especially at a time when her department was shorthanded. The Trial Examiner further stated that he had no reason to doubt John Frommelt was genuinely angry over the shipping waste. If he were looking for a pretext to support a discharge, he could have then seized upon this incident. Instead, the discharge took place after Mrs. Marsh returned to work and sought out John Frommelt to reproach him for criticizing her in public. It was not until Mrs. Marsh had failed,

in the ensuing conversation, to offer any explanation for her absence when given the opportunity to do so, that she was terminated. (R. 28).

ARGUMENT.

THE TRIAL EXAMINER'S FINDING THAT THE COMPANY DID NOT DISCHARGE BEVERLY MARSH TO DISCOURAGE MEMBERSHIP IN OR ACTIVITIES ON BEHALF OF THE UNION SHOULD NOT HAVE BEEN REVERSED BY THE BOARD IN THE ABSENCE OF SUBSTANTIAL EVIDENCE SHOWING THE INCORRECTNESS OF HIS DETERMINATION.

On June 25, 1965, a highly emotional Beverly Marsh confronted John Frommelt, the young, hot-tempered son of the store owner, and publicly reproached him for his outburst at her earlier in the afternoon for the shipping mistake. Later that same evening, in the privacy of his office, she gave no explanation why she had walked off the job some twenty minutes or more before the end of her shift. Consequently, she was terminated for being absent from work without permission.

After a reading of the cold record, the National Labor Relations Board concluded that a termination under these circumstances was much out of proportion to the offense charged and could only be explained as a manifestation of hostility toward the only employee who, according to the Board, had disclosed to the Respondent her interest in the benefits which the Union claimed to offer. (R. 58). The Trial Examiner,

who heard the evidence, who could visually appraise the demeanor and credibility of the witnesses appearing before him, and who could logically assess on the spot the thrust of their testimony, did not find the act of termination a pretext to conceal an unlawful motive for discharge. (R. 28).

In the Board's decision and order, three errors were committed. The relationship between Beverly Marsh and the Union and her alleged disclosure of interest in the Union to the Respondent are greatly exaggerated by the Board in terms of what the record actually shows and the impact of the alleged disclosure. Furthermore, the Board arrives at an unsubstantiated conclusion that, because in its opinion the stated cause for discharge was insufficient, the Company must necessarily have intended to discriminate against Mrs. Marsh by discharge because she was a "revealed adherent" of the Union. Finally, the Board is in error by disregarding the determinations of credibility of witnesses made by the Trial Examiner in deciding what the real motivation for the discharge was.

I.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT BEVERLY MARSH WAS DISCHARGED BY JOHN FROMMELT BECAUSE SHE WAS A REVEALED UNION ADHERENT.

If John Frommelt discharged Beverly Marsh because she was a Union adherent, he must be shown

to have known of her Union interest and activities and to have acted upon that knowledge. *NLRB* v. *Whitin Machine Works*, 204 F. 2d 883, 884 (C.A. 1).

Nowhere in the record has the General Counsel proved that this was the case.

Beverly Marsh signed a Union pledge card on April 13, 1965, but there is no evidence in the record or allegation therein that John Frommelt knew this fact before the trial date of this proceeding, February 8, 1966. (Tr. 36).

When John Frommelt met individually with Mrs. Marsh in the coffee shop of Store No. 2, he did not infer or assume she was a Union member or interested in the Union. Quite to the contrary, he treated her as a knowledgeable employee who was aware of Union activity occurring a few years before and whose continued loyalty to the Company, as distinguished from the Union, would be appreciated. (R. 16; Tr. 37). Using Mrs. Marsh's recollection of this meeting as the uncontroverted basis for conclusions, there is no evidence of improper or coercive statements by John Frommelt, and no evidence Mrs. Marsh volunteered any information about the Union or any connection she may have had with such an organization.

Therefore, the episode involving the Union leaflet must be the straw at which the Board is grasping to

reveal Mrs. Marsh as an aggressive, militant adherent of the Union, one whom the Company would apparently on the basis of such incident keep in mind for some two months thereafter to discharge at the first opportunity. According to Mrs. Marsh, she brought the leaflet to work on or around May 4, 1965 to discuss the benefits with the Frommelts. In fact, she did discuss the benefits with Bob, at first in a joking manner and then more seriously, but never in angry conversation. (Tr. 63). It is significant that Beverly Marsh's discussion was an entirely personal one with reference to her own wage scale, health benefits and vacation. All that can be drawn from the discussion is that Mrs. Marsh would personally have liked to have had certain improvements in benefits, but at no time did she refer to Union organization, her membership or interest in the Union, or use of the Union as a vehicle for obtaining her objectives. (Tr. 47). Bob Frommelt recalls concluding the discussion with a wishful statement that he would be happy to get three weeks' vacation himself. (Tr. 391). Although the benefits outlined in the leaflet were subsequently discussed by the Frommelts in the interest of being defensible in the community with respect to wages and conditions, Bob Frommelt regarded the discussion with Mrs. Marsh so lightly that he did not even report it to his brother, John. (Tr. 392). Attempts to show that the Frommelt brothers became extremely cool and heaped work on Mrs. Marsh following the above-

described episode appear painfully contrived to the extent that the Trial Examiner merely repeats the charges without giving them weight. (R. 23, 24). References above in the Statement of the Case to conflicting testimony with respect to coolness toward Mrs. Marsh, picking on her, eliminating the "wild drawer," and assigning excise tax work, demonstrate on their face how unconvincingly the allegations were supported and why the Trial Examiner was justified in giving them little or no weight.

What does impress the Trial Examiner is the lapse of time between the incident of the leaflet on May 4, 1965 and Beverly Marsh's discharge on June 25, 1965. The most the Trial Examiner can draw from the facts is that Mrs. Marsh did manifest an interest in the level of Union benefits to Robert Frommelt on May 4, 1965, but he is unable to substantiate from the record any causal connection between that isolated incident and John Frommelt's intemperate behavior toward Mrs. Marsh two months later. There is no evidence in the record that following May 4, 1965, Mrs. Marsh engaged in any further discussion of benefits, that the Union continued its organization efforts, or that Mrs. Marsh was identified with the Union cause. To impute to John Frommelt knowledge of a discussion of Union benefits between Mrs. Marsh and his brother and as a consequence thereof to assume John Frommelt regarded Mrs. Marsh as a

revealed Union adherent whom he would have to find a pretext to discharge does violence to the burden of proof which the Board must sustain by substantial evidence. Consequently the Board cannot support its finding on mere suspicion, for it is clear from case law that an allegation that the discharge of an employee was motivated by Union activity must be based upon evidence, direct or circumstantial. *Osceola Co. Co-op. Cream. Assn.* v. *NLRB*, 251 F. 2d 62, 69 (C.A. 8); *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 491 (C.A. 8); *Schwob Manufacturing Co.* v. *NLRB*, 297 F. 2d 864, 867 (C.A. 5); *NLRB* v. *Western Bank & Office Supply Co.*, 283 F. 2d 603, 606 (C.A. 10). Nor does an employer's general hostility to Unions, without other support, supply an unlawful motive to a specific discharge. *NLRB* v. *Atlanta Coca-Cola Bottling Company*, 293 F. 300, 304 (C.A. 5), rehearing denied, 296 F. 2d 896; *Ore-Ida Potato Products, Inc.* v. *NLRB*, 284 F. 2d 542, 545-546 (C.A. 9); *NLRB* v. *Redwing Carriers, Inc.*, 284 F. 397, 402 (C.A. 5).

In the absence of proof that the discharge was discriminatorily motivated, the Board must find that John Frommelt terminated Beverly Marsh for the reason he stated.

II.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE TERMINATION OF BEVERLY MARSH FOR BEING ABSENT WITHOUT PERMISSION WAS A PRETEXT TO CONCEAL AN UNLAWFUL MOTIVE FOR THE DISCHARGE.

The Trial Examiner found that John Frommelt discharged Beverly Marsh because she was absent without permission and without explanation. (R. 28). To reverse this finding, the Board must prove with substantial evidence that Mrs. Marsh was terminated for discriminatory reasons and not for the reason given. And the burden of proving an improper motive for discharge is upon the Board. *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 491 (C.A. 8); *Ore-Ida Potato Products, Inc.* v. *NLRB*, 284 F. 2d 542, 545-546 (C.A. 9).

According to the Trial Examiner, he took into account the lapse of time between the leaflet discussion and the events of June 25, 1965. (R. 28). On that date, he found that John Frommelt was genuinely angry when he scolded Mrs. Marsh for her shipping error, but significantly John Frommelt did not terminate her on the spot. Had he been lying in wait for a pretext to discharge Mrs. Marsh, this would have been his opportunity. Actually, it was Mrs. Marsh who later provoked her termination by seeking out John Frommelt to reproach him for the manner in which he publicly criticized her. When asked for an explana-

tion of her absence from the store following this incident, she was silent. Whether the sanction of discharge under these circumstances was too severe for the offense is not for the Board to decide unless discrimination is involved.

The Board must prove that the Company violated Section 8(a) (3) of the Act by discriminatory discharge having as its object encouraging or discouraging membership in a labor organization. In construing this Section of the Act, the United States Supreme Court said:

> "The language of Section 8(a) (3) is not ambiguous. The unfair practice is for an employer to encourage or discourage membership by means of discrimination. This section does not outlaw the encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed." (*Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 42-43)

Cases arising under Section 8(a) (3) are clear that the discharge of an employee, with or without reason, is not substantial evidence of intent to affect labor unions or to affect the rights of employees under the Act. *NLRB* v. *Citizen-News Co.*, 134 F. 2d 970,

973 (C.A. 9). Indeed an employer may hire and discharge at will so long as his action is not based on opposition to union activities. *Farmers Co-Operative Co.* v. *NLRB*, 208 F. 2d 296, 303-304 (C.A. 9); *NLRB* v. *United Parcel Service, Inc.*, 317 F. 2d 912, 914 (C.A. 1); *NLRB* v. *Local 294, International Brotherhood of Teamsters, Etc.*, 317 F. 2d 746, 749 (C.A. 2).

As to the sufficiency of the cause for discharge, "The Board does not dispute the contention that an employee may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." *NLRB* v. *Condenser Corporation*, 128 F. 2d 67, 75 (C.A. 3).

Thus, if John Frommelt discharged Beverly Marsh for a trivial occurrence in the heat of anger, it is not a discriminatory discharge unless it is proved (not assumed) that the employer knew the employee was engaged in protected activity and actually effected the discharge for that reason. *NLRB* v. *Whitin Machine Works*, 204 F. 2d 883, 884 (C.A. 1).

Reference is made to conduct of the Company, more than two months before the discharge, which the Trial Examiner found was a violation of 8(a) (1). No cross exceptions to these findings were entered because the manner in which the interviews were

conducted in itself may well have run afoul of the Act, and disputing what was said in the individual interrogations would have been a useless exercise. However, violation of one section of the Act does not in any way prove violation of another section. A case in point, although much more extreme, is *NLRB* v. *South Rambler Co.*, 324 F. 2d 447, 449-450 (C.A. 8). There an employer violated the Act by interrogating his employees as to their Union activities, threatening that his automobile agency would be closed down and discharging an employee for initiating the drive to unionize the agency. The Court held that the Board must have substantial supporting evidence that the discharge of another employee was also illegal where the sole Union activity of the other employee was signing a Union pledge card. Consequently the Board's order requiring reinstatement of the employees could not be enforced because the inference drawn by the Board to the effect that the employee's discharge was motivated by his Union activity was based upon mere suspicion.

In the instant case, the Board's finding that because the penalty of discharge was much out of proportion to Mrs. Marsh's offense and could only be explained by reason of her manifested interest in Union benefits is mere conjecture based on suspicion. No evidence, direct or circumstantial, supports such a conclusion.

III.

THE EVIDENCE RELIED UPON BY THE TRIAL EXAMINER WITH RESPECT TO THE REASON FOR THE DISCHARGE BASED UPON HIS DETERMINATION OF THE CREDIBILITY OF WITNESSES CANNOT BE DISREGARDED BY THE BOARD.

The question of what was in the mind of John Frommelt at the time he terminated Beverly Marsh is crucial to this case. Only through the examination of witnesses including John himself and the surrounding circumstances can the question of motivation be determined. And where there is a conflict of testimony, someone must resolve the matter of who is to be believed, preferably someone who can observe, hear, appraise and evaluate firsthand those who testify.

Courts of law have established the general rule that the jury or trial judge sitting without a jury are the exclusive judges of the credibility of witnesses and the weight of the evidence. It is respectfully submitted that the general rule in Board practice is the same and that the Trial Examiner sits as the exclusive judge of the matter of credibility. The duty to pass upon the weight of the evidence and to determine the credibility of witnesses rests upon the Trial Examiner and when disagreement arises between the Board and the Examiner, the reviewing Court may not disregard the superior advantages enjoyed by the Trial Examiner for determining the witnesses' credibility. *NLRB* v. *Hamilton Plastic Molding Co.*, 312 F. 2d 723, 727

(C.A. 6). Where the Trial Examiner finds the testimony of a witnesses truthful and there is nothing to render the testimony improbable or incredible, the finding of the Trial Examiner should not be disregarded by the Board. In fact, contradictory findings of the Board will be set aside on judicial review. *NLRB* v. *Universal Camera Corp.*, 190 F. 2d 429, 431 (C.A. 2). Where conflicts arise in unfair labor practice decisions, the judgment of the Trial Examiner as to which witnesses are telling the truth is rarely subject to reversal. *Sardis Luggage Co.* v. *NLRB*, 234 F. 2d 190, 194 (C.A. 5). As the United States Supreme Court said in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 495: "Nothing in the statute suggests the Labor Board should not be influenced by the Examiner's opportunity to observe the witnesses he hears and sees and the Board does not."

The critical determination of credibility which the Trial Examiner made in the instant case is his acceptance of John Frommelt's statement that unauthorized absence was the actual reason for the discharge of Beverly Marsh. (R. 28). In support of this determination, he gives no credence to testimony, offered to prove other motivation for the discharge, that the Frommelt brothers turned unfriendly to Mrs. Marsh after the leaflet incident, constantly picked on her, loaded her with work and went out of their way to increase the burden of her work. (R. 26, 27). What he finds is a

period between May 4, 1965 and June 25, 1965 in which nothing bearing on the discharge of Beverly Marsh took place. On the basis of live testimony which he has seen and heard, with an opportunity to observe and question the witnesses, he warns against reaching beyond the evidence for opinions and conclusions which cannot be supported. (R. 27).

Where Board findings have conflicted with those of the Trial Examiner, the reviewing Court has set them aside where the Board could not make such determinations without discrediting a witness who was credited by the Trial Examiner. *Boeing Airplane* Co. v. *NLRB*, 217 F. 2d 369, 375-376 (C.A. 9); *NLRB* v. *Kaiser Aluminum & Chemical Corp.*, 217 F. 2d 366, 369 (C.A. 9). Short of a showing by substantial evidence that the Trial Examiner was incorrect, the Board cannot reverse his finding, based upon a determination of credibility of testimony, that John Frommelt was in a genuine rage and discharged Beverly Marsh for the reason he stated.

In summary, John Frommelt was found by the Trial Examiner, the trier of fact, to have discharged Beverly Marsh for being absent without permission. That John did so in a fit of anger, for a reason which may not have called for such drastic action, and that she did not offer explanation and seek reconsideration, are matters beyond the purview of the Board's

authority to consider. In the absence of proof of unlawful motive, the Board may not substitute its judgment as to the sufficiency of the cause for discharge for that of the employer. *NLRB* v. *Wagner Iron Works*, 220 F. 2d 126, 133 (C.A. 7).

CONCLUSION.

For the reasons herein stated, it is respectfully submitted that the petition for enforcement of that portion of the Board's decision and order which finds the Respondent has violated Section 8(a) (3) of the Act and orders the reinstatement of Beverly Marsh should be denied.

Dated: January 16, 1968, at Berkeley, California.

Respectfully submitted,

CORBETT & WELDEN

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CERTIFICATE.

The undersigned certifies that he has examined the provision of Rules 18, 19 and 39 of this Court and, in his opinion, the tendered brief conforms to all requirements.

CORBETT & WELDEN
LAURENCE P. CORBETT

Attorneys for Respondent

APPENDIX

APPENDIX A

This appendix is prepared pursuant to Rule 18(f) of the Rules of this Court, References are to pages of the original transcript of record.

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) - 1(f)	6	5	6
2	8	8	8
3	14	14	14
4	35	35	35
5(a) - 5(c)	149	148	149
6	298	298	298
7	434	434	434

RESPONDENT'S EXHIBITS

1	256	256	256
2	299	302	303